



EDRI's Position Paper on Council text regarding net neutrality

The purpose of this document is to provide an analysis of the Council text, in order to show its limits, contradictions and problems.

Loopholes mean discrimination, less competition, less innovation, less freedom of communication

We need a text that is clear. A Regulation with loopholes creates legal uncertainty and market uncertainty. Loopholes only benefit those seeking to implement discriminatory business models.

What is needed?

Whether or not net neutrality will be protected or destroyed by this legislation hinges on the “other” access services that internet providers will be able to offer. If these are allowed to include discriminatory “fast lane” access to online services or services competing directly with online services, then this will mark the end of net neutrality. If the text adopted does not allow this and (consistent with the successful history of European telecoms regulation) prohibits such discrimination, then net neutrality will be protected.

What does the Council text say?

By failing to provide a clear distinction between “other” access services and access to the internet, it allows for the creation of a two-tiered system, reclassifying access to normal online services and thereby allowing discrimination.

The “other access services” are defined in Article 3.3, with an attempted clarification in recital 7.

Article 3(3): Providers of electronic communications to the public, including providers of internet access services, shall be free to enter into agreements with end-users, including and/or providers of content, applications and services *to deliver a service* other than internet access services, *which requires* a specific level of quality. *(emphasis added)*

This text is somewhat confusing. The reference to services which “require” a specific level of quality appears to be an effort to restrict these non-internet access services to services that could not be provided without a specific quality of service. However, this is just an appearance and is not what the text actually says.

The word “requires” refers to the non-internet access service. Put simply, agreements are possible in order to deliver access services that require a specific quality of service, irrespective of any



discrimination between services using this “fast lane” and services using the best-effort internet.

Would an agreement to deliver a “fast lane” to Google require a specific quality of service? Almost certainly. Would this be discriminatory? Almost certainly. Would such a fast lane be prohibited by the Council text? No.

This interpretation is confirmed by recital 7:

[7] End-users, including providers of content, applications and services, and end users should therefore remain free to conclude agreements with providers of electronic communications to the public, which require specific levels of quality of service.

The logic here is even more circular. If an agreement is concluded for a specific quality of service, then, by definition, the agreement will require that quality of service to be delivered. Unlike the Parliament's first reading amendments (recital 15, article 23.2), the quality of service is not required by the functionality that the service is offering. This is the way to prevent a two-tiered ecosystem, while nurturing innovation in both fields (access services and online services).

Is there any type of abuse of net neutrality that the Council text would prohibit? No.

Finally, the first sentence of paragraph 3.4 further reinforces the impression that the drafters were seeking to recognise the possibility for discriminatory behaviour:

Article 3.4: Subject to this paragraph, providers of internet access services shall equally treat equivalent types of traffic when providing internet access services.

That is the only obvious explanation for the qualifier “subject to this paragraph,” implying that equivalent types of traffic may be treated differently by internet providers in relation to the activities listed in the rest of the Regulation.

Such a two-tiered system poses significant risks for the European online economy. Particularly after the FCC decision for strong net neutrality in the USA, the innovative capacity of the European internet economy would suffer from the boost given to US businesses and their investors from the guarantee of an open online economy. The legalisation of paid prioritization business models will also undermine the incentive for infrastructure investment.

Meaningless “safeguards”

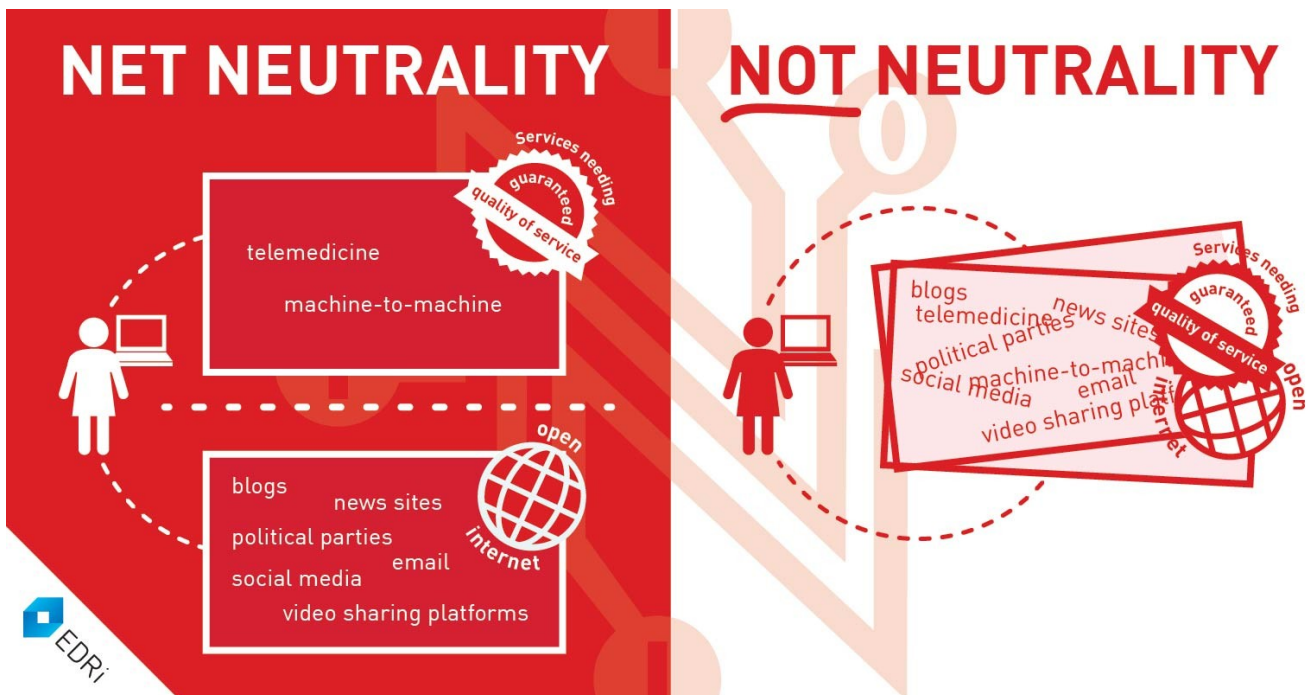
Article 3(2): [...] Such agreements, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the right of end-users set out in paragraph 1.

[6] [...] Commercial practices should not, **given their scale**, lead to situations where end-users' choice is **significantly reduced in practice**.

(7) [...] Such services should not be offered as a replacement for internet access services, and their provision should not **impair in a material manner** the availability and quality of internet access services for other end-users.

If these “safeguards” had any meaning, then almost all of the European legislation on telecommunications liberalisation was not needed. In a discriminatory environment, the discriminated-against service continues to exist, the end-user can still use the discriminated-against service and the extent to which the “availability and quality” of the discriminated-against service is impossible to quantify.

Article 3(2) claims to protect the users and content, application and service provider from discriminatory practices of internet access providers, but fails to do so because the access and content levels are conflated, robbing the text of any real meaning. As a result, the text is merely acknowledging the negative consequences of the Regulation rather than preventing them. This distinction is the difference between net neutrality and not neutrality.



Legal obligations: What is needed?

Almost nothing, in fact. It is doubtful whether a clarification was needed that internet access providers taking measures to respect a legal order would not be in breach of net neutrality. However, if one was needed, this is now in the Council text:

Article 3(4)(a): comply with legal obligations to which the internet access service provider is subject;

Even though this is completely clear, the Council appears to have felt that either lawyers, national regulatory authorities or judges needed to have an explanation of “legal obligations”. The “explanation” it produced, in recital 9, lacks of coherence:

(9) [...] Those legal obligations should be laid down in Union or national legislation (for example, Union or national legislation related to the lawfulness of information, content, applications or services, or legislation related to public safety), in compliance with Union law, or they should be established in measures implementing or applying such legislation, such as national measures of general application, courts orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content). The requirement to comply with Union law relates, among others, to the compliance with the requirements of the Charter of Fundamental rights of the European Union in relation to limitations of fundamental rights and freedoms. [...]

From the context, we can be certain that “other measures” and “general measures of national application” are:

- not court orders
- not orders from regulatory authorities based on law, but yet
- are “provided for by law” and “necessary and genuinely meet objectives of general interest”.

This “explanation” is not needed and removes clarity. Insofar as any explanation is needed, this can be achieved perfectly by the second sentence on its own.

The same logic applies to Article 3(6). There is nothing in the Regulation which would suggest that it would change Union or national law regarding illegal content. However, insofar as a clarification was needed, the text of Article 3(6) delivers this. Recital 10 then tries to “explain” the provision, but fails to do so. It repeats some of the provisions of recital 9, adding a reckless degree of ambiguity.



“Substantially all end-points”

Legal obligations were cited to us as an explanation for the rather odd wording regarding “substantially all” end points in the definition of “internet access service”. As legal obligations are already fully covered in the text, the qualification “substantially” is not needed.

Article 2(1): “internet access service” means a publicly available electronic communications service that provides access to the internet, and thereby connectivity to **substantially all** end points of the internet, irrespective of the network technology and terminal equipment used;

“Parental controls” and “unsolicited commercial e-mails”

A third problem is the reference to “parental controls” and “unsolicited” commercial e-mails.

Article 3(4)(d): comply with an explicit request from the end-user, in order to prevent transmission of unsolicited communication within the meaning of Article 13 of Directive 2002/58/EC4 or to implement parental control measures.

The majority of all parental control systems take effect on the end-users computer, tablet or smartphone. The restriction can therefore be implemented on the end-point and does not have to happen within the network. It is worth remembering the purpose of Article 3 – it is to allow internet companies to do things which would otherwise conflict with the definition of “internet access service”.

If a parental control measure gives control to the end user to set up filters as they wish (even if this is implemented in the network), then the internet service provider runs no risk whatsoever of acting in a way which would run counter to the definition. They are still offering connectivity to all available end-points. The fact that some end-users are restricting themselves in a way which prevents them from accessing certain end-points is not contrary to Article 2(1). The same applies for unsolicited e-mails. As this text has no meaning in this context, it would be unwise to leave it in the Regulation.

Document prepared by EDRi, a coalition of 33 civil rights organisations.

For more information, please contact

Joe McNamee
Executive Director
joe.mcnamee@edri.org